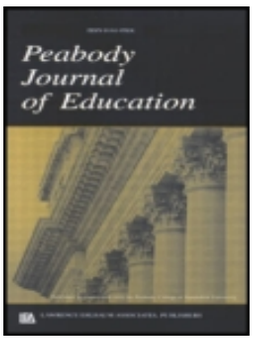

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Dollars to Discriminate: The (Un)intended Consequences of School Vouchers

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Some private, religious schools that accept vouchers have been accused of discriminating against certain populations of students through their admissions processes. Discriminating against disfavored groups (e.g., racial minorities, LGBT students, students with disabilities, religious minorities) in voucher programs raises both legal and policy concerns that have not been extensively examined in recent research. Employing legal research methods, this article examines state voucher statutes and discusses the potential for voucher programs to discriminate against marginalized groups. We argue that each state has an obligation to ensure that any benefit it creates must be available to all students on a nondiscriminatory basis—including the benefit of a publicly funded voucher for attendance at a private school. As this review of existing voucher statutes will demonstrate, legislators appear to have neglected to construct policies that safeguard student access and ensure that public funds do not support discriminatory practices. Without additional safeguards, states risk providing public money that can be used to promote discriminatory policies and practices.

Media reports suggest that some private, religious schools that accept vouchers might be discriminating against certain populations of students through their admissions process. For example, the *New York Times* reported that schools participating in Georgia's voucher program are able to expel openly gay students (Severson, 2013). The article notes that as many as a third of the schools in the scholarship program have strict antigay policies or adhere to a religious philosophy that holds homosexuality as immoral or sinful. Sher (2013) also contends that there are over 100 private schools that are eligible for public money in Georgia that may discriminate against LGBT students. Likewise, a newspaper in Indiana explained that some of the religious schools participating in the voucher program may not openly welcome LGBT families (LeFave, 2014). When asked whether LGBT students and their families would be welcome at a private Christian

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school in Indiana, the principal responded, "We believe that the Bible clearly teaches that a gay/lesbian lifestyle is contrary to God's commands. LGBT students and families would not be able to sign agreement with our Statement of Faith." Another principal stated that "We welcome any student and any family that will acknowledge and respect our statement of faith, core values and philosophy." (LeFave, 2014, p. A10). Other reports highlight that students with special needs are underrepresented in some voucher programs (see *ACLU v. Wisconsin,* 2011).

Discriminating against disfavored groups (e.g., racial minorities, LGBT students, students with disabilities, religious minorities) in voucher programs raises both legal and policy concerns that have not been extensively examined in recent research. The lack of research is concerning, considering that currently 15 states and the District of Columbia offer some populations publicly funded tuition vouchers or voucher-like programs called education savings accounts that subsidize private school enrollment. Another sixteen states have state tax credit scholarship programs for private school education (see McCarthy, 2013; Mead, 2015b; Povich, 2013).

Both traditional public schools and public charter schools are prohibited from engaging in this type of discrimination through U.S. Constitutional law, federal statutes (e.g., Title VI of the Civil Rights Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973), and various state laws. If states are funding private parental choices, what safeguards, if any, exist in the statutes and regulations governing vouchers to ensure that public vouchers are offered in a nondiscriminatory fashion?

Employing legal research methods, this article examines state voucher statutes and discusses the potential for voucher programs to discriminate against marginalized groups. We argue that each state has an obligation to ensure that any benefit it creates must be available to all students on a nondiscriminatory basis—including the benefit of a publicly funded voucher for attendance at a private school. As this review of the existing voucher statutes will demonstrate, legislators appear to have neglected to construct policies that safeguard student access and ensure that public funds do not support discriminatory practices. Without additional safeguards, states risk providing public money that can be used to promote discriminatory policies and practices.

LITERATURE REVIEW

Important questions arise about whether the use of public money for private school tuition in voucher programs is problematic if the school is permitted to discriminate in admissions or operations. In this section we discuss the literature related to sorting students in school choice programs with a specific emphasis on voucher programs and then briefly examine litigation involving voucher programs and other cases involving discrimination within a private school context.

Student Access and Voucher Programs

Vouchers have a long history in relation to discrimination, particularly racial segregation and resistance to adhere to the Supreme Court's order to desegregate schools in *Brown v. Board of Education* (Mead, 2012). In fact, so-called "choice academies," private schools that began in resistance to desegregation existed in several southern states, including Alabama, Georgia,

Louisiana, Mississippi, and Virginia (Viteritti, 1999). State and local educational policies that took advantage of the distinctions between public and private schools as a means to evade desegregation orders were struck down by the Supreme Court in 1964 in *Griffin v. County School Board of Prince Edward County* (1964). Likewise, the Supreme Court ruled in *Green v. County School Board of New Kent County* (1968) that a district's "freedom of choice" plan was improper because it did not sufficiently desegregate the schools. These rulings slowed the advent of the use of publicly funded vouchers.

Interestingly, Milton Friedman, generally recognized as the architect of voucher programs, anticipated that voucher schools would likely result in schools characterized by race and other status characteristics. As he explained in his 1962 treatise, *Capitalism and Freedom*:

> If a [voucher] proposal like that of the preceding chapter were adopted, it would permit a variety of schools to develop, some all white, some all Negro, some mixed. . . . It would in this special area, as the market does in general, permit co-operation without conformity. (pp. 117–118)

In a note to this passage, Friedman clarified that "[to] avoid misunderstanding, . . . I am taking for granted that the minimum requirements imposed on schools in order that vouchers be usable do not include whether the school is segregated or not" (p. 118). In the 1990s as voucher plans began to be seriously debated as educational policy initiatives (Mead, 2012), major voucher theorists Chubb and Moe (1990) argued that voucher systems should accept whatever sorting of students resulted from parental choices, provided no overt racial discrimination occurred. As they explained:

> Schools will make their own admissions decisions, subject only to [racial] nondiscrimination requirements. That is absolutely crucial. Schools must be able to define their own programs in their own ways, and they cannot do this if their student population is thrust upon them by outsiders. They must be free to admit as many or as few students as they want, based on whatever criteria they think relevant—intelligence, interest, motivation, behavior, special needs—and they must be free to exercise their own, informal judgments about individual applicants. (pp. 221–222)

Given the history of vouchers, it was not surprising that scholars cautioned that widely funding parental choices with public dollars in private schools would result in the demise of the common school (Bastian, 1990; Shanker & Rosenberg, 1992; Underwood, 1992). In addition, academics raised concerns that vouchers and other parental choice initiatives would result in stratification on the basis of race and class (Apple, 1993; Kozol, 1991; Liebman, 1991) and student ability (Daniel, 1993; Liebman, 1991; McKinney, 1992, 1994; Moore & Davenport, 1990; Underwood, 1991a, 1991b, 1992). A number of authors also argued that any parental choice system, including voucher programs, would result in higher concentrations of children with disabilities in traditional public schools and warned that students' rights under federal disability law could be compromised (Cudahy, 1991; Daniel, 1993; McKinney 1992, 1994; Underwood, 1991a, 1991b, 1992; Wong, 1993).

A few contemporary legal scholars have also questioned the legal issues involving voucher programs that discriminate against certain populations of students. Kavey (2003) asks whether requiring private, religious schools to comply with antidiscrimination policies would violate the school's First Amendment rights. For example, what if a voucher school objects to enrolling racial minorities, girls, or LGBT students based on religious beliefs? He observes that most voucher legislation does not always include antidiscrimination measures. Brownstein (1999)

raises similar arguments and questions whether voucher schools can constitutionally exclude certain groups of students. In fact, a survey of 241 private schools participating in voucher programs in Cleveland, Cincinnati, Dayton, Indianapolis, and Milwaukee conducted by Stuit and Doan (2013) found that 52% of private voucher school leaders believed that "upholding student admission criteria" was very or extremely important when deciding whether to take part in the voucher program. Likewise, Mickelson, Bottia, and Southworth (2012) caution that since all private schools, particularly religious schools, tend to be more segregated than their public counterparts, voucher programs would likely increase segregation on the basis of race, ethnicity, class, and achievement.

Though little contemporary research exists to document the stratifying effects of vouchers and whether or not discrimination is occurring, critics of vouchers continue to voice concerns that voucher programs and the schools that participate in them do not provide equal access to all students regardless of race, ethnicity, sex, sexual orientation, or disability (Orfield & Frankenberg, 2013; Ravitch, 2013). Of course, in some instances, lack of participation in voucher schools may be the result of transportation issues or other factors.

CASE REVIEW

Voucher Litigation

Voucher programs involving private religious schools were long considered unconstitutional after the U.S. Supreme Court's ruling in *Committee for Public Education & Religious Liberty v. Nyquist* (1973). That assessment changed with the U.S. Supreme Court's *Zelman v. Simmons-Harris* (2002) decision. *Zelman* considered whether the Cleveland voucher program violated the Establishment Clause of the First Amendment by providing public funds to pay for private religious school tuition. A divided (5-4) Court held that a state could enact a voucher program that included private religious school participation consistent with the Establishment Clause. The Court set forth three criteria to judge whether such programs meet constitutional directives prohibiting state support or endorsement of religion: (a) the program must serve a legitimate secular purpose; (b) the program may not define recipients of the voucher using religious criteria; and (c) parents must have a "genuine choice" among religious and nonreligious options (Zelman, 2002, p. 662).

Post-*Zelman*, voucher litigation shifted to state courts to determine whether such programs met state constitutional guarantees under either religion clauses, education clauses, or both. As Mead (2015b) explained:

> Courts in nine states considered thirteen cases examining the constitutionality of vouchers, tax credit scholarship programs, or education savings account programs in relation to the state's constitutional provisions governing education. Each of the cases reviewed was a direct facial challenge to the propriety of the program under scrutiny. . . . [P]laintiffs won challenges to programs in five cases and programs were upheld in seven cases. (pp. 151–152, footnotes omitted)

None of the cases directly raised discrimination claims. Still, a close reading of the decisions reveals some discussion of the issue.

For example, in footnote 4 of the Louisiana voucher decision, the court noted that the Louisiana Constitution (art. VIII, § 13) provides, in pertinent part, that: "Consistent with Article VIII of this constitution, relevant to equal educational opportunities, no state dollars shall be used to discriminate or to have the effect of discriminating in providing equal educational opportunity for all students" (*Louisiana Federation of Teachers v. State*, 2013, p. 1039).

Similarly, those opposed to North Carolina's voucher system alleged that money was being funneled to schools that discriminate in their admissions policies. For example, at one sectarian school, families sign contracts agreeing that they are in 100% agreement with the school's fundamental doctrinal practices. The school also has an application that states "we are not a church school for those in cults, i.e., Mormons, Jehovah's Witness, Christian Science, Unification Church, Zen Buddhism, Unitarianism, and United Pentecostal" (see Heffner, 2014, p. 1). In their complaint, the plaintiffs contended that the voucher law "does not include any enforcement or accountability provisions to ensure that institutions receiving vouchers do not exclude minority students, disabled students, or students from poor families" (*Hart v. State of North Carolina,* Complaint, 2013, p. 12). A trial court judge issued a permanent injunction, prohibiting the state from implementing the voucher program (*Hart v. State of North Carolina*, 2014), including an observation that nonpublic schools may discriminate on the basis of religion. The North Carolina Supreme Court, however, reversed that holding. The state high court reasoned that the question of whether the schools discriminate on the basis of religion is a matter that must be left for future litigation. As the court explained:

> Here plaintiffs are taxpayers of the state, not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the Opportunity Scholarship Program. Because eligible students are capable of raising an Article I, Section 19 discrimination claim on their own behalf should the circumstances warrant such action, plaintiffs have no standing to assert a direct discrimination claim on the students' behalf. (*Hart v. State of North Carolina*, 2015, p. 294)

Other Litigation Focused on Discrimination and Private Schools

In addition to understanding litigation on voucher programs, the issue raised by this study requires a review of courts' treatment of private school practices in general. In *Green v. Kennedy* (1970), a federal district court prohibited the tax exempt status of private K–12 schools that admitted only white students. The court enjoined the IRS from granting tax exempt status to schools with such policies. The court observed that the due process clause of the Fifth Amendment prohibits the federal government from aiding private racial discrimination in a way that would be forbidden under the Fourteenth Amendment. The federal district court stated:

> In our view the scope of constitutional protection cannot be so narrowly defined to disregard the impact of past State action and support, and to ignore the significance of current Federal support from tax benefit. (p. 1137)

Likewise in *Norwood v. Harrison* (1973), the Supreme Court held that it is unconstitutional for the government to provide any tangible assistance to schools, including private schools that discriminate based on race. In this case, Mississippi private schools had been receiving state-subsidized textbooks. Also, in *Runyon v. McCrary* (1976), a private school that prohibited

black students from enrolling was challenged by two African American students. The Supreme Court ruled that Section 1981 prohibits private, nonsectarian schools from practicing racial discrimination. The Court held that "invidious private discrimination" had "never been accorded affirmative constitutional protections" (p. 176). The Court further observed that the Civil Rights Act of 1866 "prohibits racial discrimination in the making and enforcement of private contracts" (p. 169).

Finally, in 1982 the U.S. Supreme Court addressed whether Bob Jones University and Goldsboro Christian School, both private schools that practiced racially discriminatory policies based on religious beliefs, could still qualify as tax-exempt organizations (*Bob Jones University v. United States*, 1983). The Court ruled that tax exemption was a privilege, and as a result the private schools needed to comply with nondiscrimination law in order to retain it. The Court reasoned that the Free Exercise Clause was not violated by such a requirement because the government has a compelling state interest in eradicating racial discrimination. The Court found that national policy discouraged discrimination in education, and a private school without a racial nondiscrimination policy is not "charitable" within the common law concept. In *Bob Jones* (and *Norwood v. Harris*), the Court reasoned that "discriminatory treatment exerts a pervasive influence on the entire educational process" (p. 594).

One Supreme Court case, *Boy Scouts of America v. Dale* (2000), might be read to contradict some of the reasoning in *Green*, *Runyon*, *Bob Jones*, *Norwood*, and other cases that concerned discrimination in the private context (see *Roberts v. United States Jaycees*, 1984). It addressed whether the Boy Scouts could exclude gay scout leaders. New Jersey's state employment law prohibited discrimination on the basis of nine different traits, including sexual orientation. After a scout leader was prohibited from leading a chapter because of his sexual orientation, he sued. The Supreme Court ruled that the free speech right of expressive association permits the scouts to exclude gay scout leaders. However, this decision can be distinguished from the earlier cases because it reviewed only private conduct—that of the Boy Scouts. The other cases all examined whether private schools could receive particular public benefits (tax-exempt status, tangible materials) in view of their discriminatory practices. The *Dale* case, therefore, did not examine what price the Boy Scouts may legitimately have to pay or what benefits of public programming they may have to forego in order to continue to be "associating" in the manner they determined.

Another important Supreme Court precedent affecting this issue of discrimination on the part of private schools participating in voucher programs is *Alexander v. Choate* (1985). Plaintiffs in this case were Medicaid patients with disabilities, who argued that a Tennessee policy that restricted hospital stays to 14 days per fiscal year violated Section 504 of the Rehabilitation Act. The Court held that the provision was not discriminatory because it provided "meaningful access to the benefit" (p. 301). In the context of school vouchers, the question becomes what must be done to ensure that eligible students have meaningful access to the voucher benefit?

Taken as a whole, then, these cases suggest that states must ensure that the benefit provided through voucher programs does not support discrimination, is meaningfully accessible to all eligible, and suggests that the "privilege" of participation in a voucher program could legitimately be conditioned on the requirement to avoid discrimination in all its forms.

Federal Laws Requiring Nondiscrimination

As noted in the brief discussion of *Zelman* (2002) earlier, the First Amendment's religion clauses apply to the issues raised by this study. The Establishment Clause, read in conjunction with the Free Exercise Clause, ensures that governmental entities neither endorse a single religion nor discriminate against individuals on the basis of religious belief.

The primary source of law requiring nondiscrimination is the Fourteenth Amendment of the U.S. Constitution. It reads:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV)

As noted, it applies to states and has been interpreted to require that state governments ensure that any benefit created by state law be offered to all on an equal basis (see generally Superfine, 2013).

Several federal statutes have codified this principle. Title VI of the Civil Rights Act prohibits recipients of federal financial assistance from discriminating on the basis of "race, color or national origin" (42 U.S.C. 2000d). Moreover, Title VI regulations require that recipients of federal dollars—such as state governments—"may not, directly or through contractual or other arrangements . . . [d]eny an individual any disposition, service, financial aid, or benefit" [28 C.F.R. § 42.104(b)].

Similarly, Title IX of the Education Amendments of 1972 bars educational institutions that receive federal funds from discriminating on the basis of sex, ensuring that comparable educational benefits are available regardless of a student's sex (20 U.S.C. § 1681 *et seq*.). At the behest of Congress, Title IX's regulations were revised in 2006 to permit single-sex classes and schools (34 C.F.R. § 106.34; 71 Federal Register 62530 [Oct. 26, 2006]). Title IX has also been interpreted to require schools that receive federal monies to ensure equal access and treatment for children regardless of sexual orientation or gender identity (see e.g., U.S. Department of Education, Office for Civil Rights, 2014).

Finally, Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by recipients of federal financial assistance (29 U.S.C. § 794) and the Americans with Disabilities Act (ADA) extends those prohibitions into the private sphere (42 U.S.C. §§ 12131-12134). As such, both Section 504 and the ADA require state governments to ensure nondiscriminatory access to all their programs. In addition, Title III of the ADA requires that those entities that offer public accommodations, including private schools, make reasonable modifications to programming in order to avoid discrimination on the basis of disability. Like Title VI, the ADA also requires that benefits made available "through contractual, licensing, or other arrangements" avoid discrimination on the basis of disability [28 C.F.R. § 35.130(b)(1)].

The U.S. Department of Justice (DOJ) has weighed in on discrimination and vouchers in a few instances. It pursued an injunction against the Louisiana voucher program because it was concerned with alleged violations of federal desegregation law. Although this motion was eventually dropped, a federal district court judge ruled that the DOJ was permitted to monitor Louisiana's voucher program to ensure racial nondiscrimination both within the voucher program itself and to ascertain whether the program increased segregation in public schools (*Brumfield v. Dodd*, 2014; Louisiana School Voucher Program, 2015; for a discussion of the dispute, see

Welner, 2013). Pro-voucher groups, unhappy with the judge's approval of DOJ monitoring, appealed and the Fifth Circuit Court of Appeals reversed that ruling, holding that the district court lacked subject matter jurisdiction because the voucher program was outside the court's supervisory scope in this long-standing desegregation suit (*Brumfield v. Dodd*, 2015).

The DOJ also reviewed a complaint of disability discrimination in the Milwaukee voucher program. The American Civil Liberties Union (ACLU) and Disability Rights Wisconsin (DRW) alleged that participating voucher schools only enroll 1.6% of students with disabilities compared to 19.5% of the students with disabilities in the Milwaukee Public School System (*ACLU v. Wisconsin*, 2011). They asserted that some participating private schools violated their obligations under Title III of the ADA and that the State of Wisconsin violated both Section 504 and the ADA by not monitoring the situation or adopting policies that ensured nondiscriminatory access. In a letter to the Wisconsin Department of Public Instruction (DPI), the DOJ observed that "[t]he private or religious status of individual voucher schools does not absolve DPI of its obligation to assure that Wisconsin's school choice programs do not discriminate against persons with disabilities" (U.S. Department of Justice, 2013, p. 3). Accordingly, the federal agency directed that the DPI must do more in order to "implement and administer the school choice program in a manner that does not discriminate against children with disabilities or parents or guardians with disabilities" (U.S. Department of Justice, 2013, p. 2; for a comprehensive analysis of this dispute, see Mead, 2015a). The DOJ recently closed the case without further action (U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section, 2015).

METHODS

The law influences educational policy matters (see Superfine, 2009; Superfine, 2010; Superfine & Goddard, 2009), and, as a result, legal research methods are often used to gather sources of data (see First, 2006; Lee & Adler, 2006; Russo, 2006; Schimmel, 1996). We used two legal databases, Lexis-Nexis and Westlaw, to locate state voucher statutes. Consistent with other researchers, we found that 15 states and the District of Columbia have some form of publicly funded private school voucher or voucher-like program (McCarthy, 2013, Povich, 2013). For the purposes of this study, we included both traditional voucher programs as well as voucher-like programs such as education savings accounts, which similarly subsidize private education with permitting state dollars (for a discussion of the differences between the two, see Mead, 2015b). We omitted tax credit scholarship programs because they are funded by a different mechanism. For the purposes of simplicity, we use the term "voucher program" to include both vouchers and education savings accounts in the remainder of the paper. We identified voucher statutes from the following states: Arizona, Florida, Georgia, Indiana, Louisiana, Maine, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Vermont, Wisconsin, and Washington DC.

Table 1 lists the 25 currently operating voucher programs and the type of voucher provided. As illustrated, four main types of voucher programs have developed: (a) voucher programs that are specific to a city, (b) voucher programs that are specifically designed for children with disabilities to provide special education, (c) voucher programs that provide tuition in school districts that do not operate public schools at that grade level, and (d) statewide voucher programs. It should be noted that two of the statewide voucher programs (Arizona and Indiana) also include

TABLE 1
Currently Operating Voucher Programs by Type[1]

City-specific voucher programs	Ohio: Cleveland Scholarship and Tutoring Program (1995)—(Ohio Rev. Code §§ 3313.975 to 3313.979)
	Washington, DC: DC Opportunity Scholarship Program (2004)—(DC Code § 38-1851.01 *et seq*.)
	Wisconsin: Milwaukee Parental Choice Program (1990)—(Wis. Stat. § 119.23)
	Wisconsin: Racine Parental Choice Program (2011)(Wis. Stat. § 118.60)
Special education voucher programs	Florida: John M. McKay Scholarship (2001)—(Fla. Stat. §§ 1002.39 & 1002.421)
	Georgia: Georgia Special Needs Scholarship (2007)—(Ga. Code Ann. §§ 20-2-2110 to 20-2-2118)
	Louisiana: School Choice Pilot Program for Certain Students With Exceptionalities (2010)—(La. Rev. Stat. § 17:4031)
	Mississippi: Mississippi Dyslexia Therapy Scholarship for Students With Dyslexia Program (2012)—(Miss. Code Ann. §§ 37-173-1 to 37-173-31)
	Mississippi: Nate Rogers Scholarship for Students With Disabilities Program (2013)—(Miss. Code Ann. §§ 37-175-1 to 27-175-29).
	Mississippi: The Equal Opportunity for Students With Special Needs (2015)—(Miss. Code. Ann. §§ 37-181-1 to 37-181-21)
	North Carolina: Special Education Scholarship Grants for Children With Disabilities (2013)—(N.C.G.S.A. §§115C-112.5 to 115C-112.9)
	Ohio: Autism Scholarship Program (2003)—(Ohio Rev. Code §§ 3310.51 to 3310.64)
	Ohio: Jon Peterson Special Needs Scholarship Program (2011)—(Ohio Rev. Code §§ 3310.41 to 3310.43)
	Oklahoma: Lindsey Nicole Henry Scholarships for Students With Disabilities (2010)—(70 Okla. Stat. §§ 13-101.1 -101.2)
	Tennessee: Individualized Education Act (2015)—(T.C.A. § 49-10-1401 to 49-10-1406)
	Utah: Carson Smith Special Needs Scholarship Program (2005)—(Utah Code §§ 53A-1a-701-710)
	Wisconsin: Special Needs Scholarship Program (2015)—(Wis. Stat. 115.7915)
Rural districts without schools tuition voucher	Maine: Town Tuitioning Program (1873)—(20-A M.R.S.A. § 2951 and § 5204)
	Vermont: Tuition Paying Towns (1869)—(16 V.S.A. §§ 821-822)
Statewide voucher programs	Arizona: Empowerment Scholarship Account (2011)—(Ariz. Rev. Stat. § 15-2401 to § 15-2404)
	Indiana: Choice Scholarship Program (2011)—(Ind. Code § 20-51 *et seq*.)
	Louisiana: Student Scholarship for Educational Excellence Program (2008)—(La. Rev. Stat. §§ 17:4011-4025)
	Nevada: Education Savings Account (2015)—(Senate Bill 302)
	North Carolina: Opportunity Scholarships (2013)—(N.C. G.S.A. §§ 115C-562.1 to 115C-562.7)
	Ohio: Income Based Scholarship Program (2013)—(Ohio Rev. Code §§ 3310.01 to 3310.17)
	Wisconsin: Wisconsin Parental Choice Program (2013)—(Wis. Stat. § 118.60)

[1]The year that appears in parentheses indicates the year the program was first enacted.

specific provisions for children with disabilities. Finally, five states (Louisiana, Mississippi, North Carolina, Ohio, and Wisconsin) have created more than one voucher program.

Voucher laws were first examined to determine whether any provisions explicitly addressed nondiscrimination through (a) a statement of nondiscrimination; (b) requirements for the participating schools to provide services to children with disabilities; and/or (c) requirements for the participating schools to provide services to children who require English language instruction. In addition, we analyzed each statute to determine whether statutory language existed that might indirectly control for discriminatory practices through (a) requirements about admissions standards, (b) requirements for random student selection in cases of oversubscription, (c) requirements regarding private school policies, and/or (d) requirements that schools permit students to opt out of religious activities.

FINDINGS: VOUCHER ANTIDISCRIMINATION PROVISIONS

We found both explicit nondiscrimination provisions, as well as other sections that may operate to curtail any discriminatory practices in voucher programs. The policies, however, do not uniformly demand that private participating voucher schools avoid discrimination and, none of the 26 policies reviewed comprehensively addresses discrimination on the basis of race, ethnicity, national origin, sex, sexual orientation, and disability. Moreover, few of the voucher programs, other than those specifically designed for that population, include any requirements that private schools provide special education programming and none require private participating schools to attend to students' language learning needs. Table 2 summarizes those provisions.

The Washington, DC, statute has the most comprehensive explicit nondiscrimination provision, prohibiting discrimination on the basis of race, color, national origin, religion, and sex [DC Code § 38-1853.08(a)], though, like the Title IX regulations, the voucher law permits an exception for single-sex education [DC Code § 38-1853.08(b)]. The DC law also notably omits disability from the list and includes a specific provision that the program does not "alter or modify the provisions of the Individuals with Disabilities Education Act" (DC Code § 38-1853.08), which would suggest private schools are not required to provide any special education or related services to voucher students, since IDEA does not currently require them to do so.

The most common nondiscrimination provision is found in the statutes of Florida, Georgia, North Carolina, Oklahoma, Utah, and Wisconsin, all of which incorporate Title VI (42 U.S.C. 2000d) and therefore protect students only from discrimination based on race, color, and national origin [Fla. Stat. § 1002.421(2)(a); Ga. Code Ann. 20-2-2115(a)(3); N.C. G.S.A. 115C-562.5(c); 70 Okla. St. Ann. § 13-101.2(H)(3); Utah Code Ann. § 53a-1a-705(1)(c); Wis. Stat. § 118.60(2)(a)(4) & Wis. Stat. 119.23(2)(a)(4)]. In addition, Arizona, Indiana, and Tennessee [A.R.S. § 15-2401(5); ICSF 20-51-4-3; T.C.A. § 49-10-1404(b)(2)] prohibit private schools from discriminating on the basis of "race, color and national origin" without specifically referencing Title VI. Ohio prohibits discrimination on the basis of "race, religion, or ethnic background" [Ohio Rev. Code § 3313.976(A)(4)] and Louisiana requires private participating schools to observe the criteria laid out by the district court in the racial desegregation order in *Brumfield v. Dodd* (1977). Oddly, Mississippi's newest program, the Equal Opportunity for Students with Special Needs, requires schools to observe 42 U.S.C. § 1981, which ensures equal rights in contracts, rather than

TABLE 2
Explicit NonDiscrimination Provisions in Voucher Statutes

	Explicit nondiscrimination provisions	Requirement for service provision for children with disabilities	Requirement for service provision for children learning English
Arizona	Yes—May not discriminate on the basis of race, color, or national origin.	No	No
Florida	Yes—Must comply with 42 U.S.C. 2000d	Yes—Only children with disabilities eligible	No
Georgia	Yes—Must comply with 42 U.S.C. 2000d	Yes—Only children with disabilities eligible	No
Indiana	Yes—May not discriminate on the basis of race, color, or national origin	Yes—Schools may elect to participate in special education voucher program	No
Louisiana	Yes—Must comply with ruling in *Brumfield v. Dodd*	Yes—Schools may elect to participate in special education voucher program	No
Maine	No	No	No
Mississippi	Yes—Must comply 42 U.S.C. 1981	Yes—Only children with some disabilities eligible	No
Nevada	No	No	No
North Carolina	Yes—Must comply with 42 U.S.C. 2000d	Yes—Special education reimbursement program	No
Ohio	Yes—May not discriminate on the basis of race, religion, or ethnic background	Yes—Two programs specific to children with disabilities; Cleveland program permits denying admission to a child with a disability	No
Oklahoma	Yes—Must comply with 42 U.S.C. 2000d	Yes—Only children with disabilities eligible	No
Tennessee	Yes—May not discriminate on the basis of race, color, or national origin	Yes—Only children with some disabilities eligible	No
Utah	Yes—Must comply with 42 U.S.C. 2000d	Yes—Only children with disabilities eligible	No
Vermont	No	No	No
Washington, DC	Yes—May not discriminate on the basis of race, color, national origin, religion, or sex; includes an exception for religious single-sex schools	No	No
Wisconsin	Yes—Must comply with 42 U.S.C. 2000d; must adopt "nonharassment" policy	No	No

the more expansive Title VI language. Surprisingly, three states, Maine, Nevada, and Vermont, include no explicit nondiscrimination provision.

As Table 2 also depicts, voucher programs rarely include an explicit provision for children with disabilities. The programs in Indiana and Louisiana permit participating schools to elect to accept students with disabilities, though the language does not require schools to provide special services [ICSF 20-51-4-4(2); La. Rev. Stat. § 4016(B)]. Indiana's program also contains a provision that permits the parents of a child with a disability to continue to receive special education and related services from the public school of residence even after enrollment in a private voucher school (ICSF 20-51-4-4.5). The other programs addressing special education all were specifically designed for children with disabilities. Interestingly, some programs serve only particular disabilities (e.g., autism). Moreover, a number of programs contain explicit language that parents who exercise vouchers are voluntarily waiving their child's right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and relieves public school officials for any liability for providing FAPE [Ga. Code Ann. § 201-2-2114(f); La. Rev. Stat. § 4016(B); Miss. Code Ann. § 37-181-5; Ohio Rev. Code § 3310.41(B) and § 3310.53(A); T.C.A. 49-10-1403(a)(2); Utah Code 53A-1a-704(5)]. Tennessee's program for children with disabilities also has a provision that encourages parents "to consider participating schools with inclusive educational settings that educate students with disabilities and students without disabilities together" [T.C.A. § 149-10-1403(d)]. Finally, it is notable that Ohio's Cleveland program specifically states that private participating schools "may deny admission to any separately educated student with a disability" [Ohio Rev. Code § 3313.977(B)].

In addition to the explicit provisions reviewed above, each voucher policy was examined for other language that could affect a school's access to all students. Table 3 documents those provisions.

For example, even though Wisconsin voucher programs do not explicitly require that private schools promise not to discriminate on the basis of religion, three other provisions operating together arguably accomplish the same goal. Participating private schools may only reject students' applications due to lack of capacity [Wis. Stat. § 118.60(3)(a) & § 119.23(3)(a)], must randomly select students if applicants exceed the space available [Wis. Stat. § 118.60(3)(ag)(3)(b) & § 118.60(3)(ar)(3)(b) & § 119.23(3)(a)] and must permit voucher students to opt out of any religious activity [Wis. Stat. § 118.60(7)(c) & § 119.23(7)(c)].

Similarly, Louisiana's voucher law forbids schools from using eligibility criteria outside of the population targeted by the program; however, somewhat quizzically, it does not require a school to accept eligible students. Louisiana's voucher law sets up student eligibility criteria on the basis of family income and an evaluation of the quality of the student's current public school district (La. Rev. Stat. § 17:4011-4031). One section requires that voucher schools "[u]se an open admissions process in enrolling scholarship recipients in the program and shall not require any additional eligibility criteria" beyond the income and school evaluation criteria [La. Rev. Stat. § 17:4022(1)]. Another section of Louisiana's law provides that "[e]ach school shall have discretion in enrolling eligible students for participation in the program and no school shall be required to accept any eligible student" [La. Rev. Stat. 17:4031(D)(2)].

In addition to Wisconsin, Louisiana and at least four other states likewise require random selection when applicants outnumber seats available, although such provisions provide no protection for nondiscrimination if oversubscription is not reached [ICSF 20-51-4-3; La. Rev. Stat.

TABLE 3
Other Voucher Provisions Affecting NonDiscrimination

	Language about admissions standards	Random student selection for over subscription	Provisions regarding compliance with private school policies	Opt-out of religious activities
Arizona	No	No	Yes—Schools need not alter "creed, practices, policies, or curriculum" to participate	No
Florida	No	No	Yes—Parents and students must comply with all published private school policies.	No
Georgia	Yes—No obligation to accept students	No	Yes—Schools need not alter "curriculum or program of instruction" to participate; Parents and students must comply with all published private school policies	No
Indiana	Yes—Must employ "fair admissions"	Yes	No	No
Louisiana	Yes—Schools may not require additional admission criteria other than those making a child eligible for a voucher; no school required to accept a student	Yes	Yes—Parents and students must comply with all published private school policies	No
Maine	No	No	No	NA—Only nonsectarian schools may participate
Mississippi	No	Yes—But only for the Equal Opportunity for Students with Special Needs	Yes—Parents and students must comply with all published private school policies	No
Nevada	No	No	Yes—Provision regarding "independence and autonomy"	No
North Carolina	No	No	No	No
Ohio	Yes—Must provide parents reason for declining enrollment	Yes	No	No
Oklahoma	No	No	Yes—Parents must comply with any parental involvement policies	No
Tennessee	Yes—No need to alter admission practices	No	Yes—Schools need not alter practices	No

(Continued on next page)

TABLE 3
Other Voucher Provisions Affecting NonDiscrimination *(Continued)*

	Language about admissions standards	Random student selection for over subscription	Provisions regarding compliance with private school policies	Opt-out of religious activities
Utah	No	No	No	No
Vermont	No	No	No	NA—Only nonsectarian schools may participate
Washington, DC	No	No	No	No
Wisconsin	Yes—May reject only for capacity	Yes	No	Yes

§ 17:4015(3)(b); Ohio Rev. Code § 3310.02(3) & § 3313.977(A)(1)(c)]. Similarly, Indiana's requirement that private schools "abide by the school's written admission policy fairly and without discrimination" would appear to protect students (ICSF 20-51-4-3(b); however, schools are permitted to enforce existing policies, which may include, for example, a requirement that a student affirms a particular faith.

Table 3 also highlights that no other voucher program besides Wisconsin requires that schools permit students to opt out of religious activities, although both Maine and Vermont limit their programs to nonsectarian private schools (20-A M.R.S.A. § 2951; Vermont Agency of Education, 2012). Families who have challenged the law in the hopes of applying vouchers to religious schools have failed to persuade Maine's courts (*Eulitt v. Maine Department of Education,* 2004) and the Supreme Court's decision in *Locke v. Davey* (2004) established that states are not required to include religious schools in voucher programs.

Interestingly, while reviewing statutes for language which would have the effect of protecting students from discriminatory policies and practices, several voucher provisions were located that have the potential to have the opposite effect. Arizona's voucher law provides a vivid example in that it includes a section that explicitly states that a participating voucher school "shall not be required to alter its creed, practices, admissions policy or curriculum" [A.R.S. § 15-2404(C)]. Similarly, the Georgia Department of Education (2014) advises that a school participating in its program need not "alter its curriculum or program of instruction," nor is it required to accept a student who applies under the program. The Washington DCSD program also requires that students "satisfy all admissions requirements . . . be they religious or nonreligious" [Wash. DCSD Board File: JCB(D)(2)]. Finally, several programs require parents and students to comply with all private school policies [Fla. Stat. 1002.39(9)(d); Ga. Code Ann. § 20-2-2114(i); La. Rev. Stat. § 17:4022(6) & § 17:4021(D)(4); Miss. Code. Ann. § 37-173-11(d)].

Preserving private school discretion in this manner may potentially have the effect of providing nonuniform access to the voucher benefit and protecting discriminatory practices.

DISCUSSION

We found that no states have laws that provide explicit protections for all marginalized populations (i.e., at least religion, race, national origin/ethnicity, disability, sex, sexual orientation) and most states only provide specific protections for race and ethnicity (see Table 2). This is in contrast to many state charter school laws as well as workplaces that go beyond prohibiting only racial discrimination. This analysis will reveal that few safeguards exist in the state statutes governing vouchers to ensure that vouchers are offered in a nondiscriminatory fashion. To further examine the issues, we will analyze these findings with respect to each potential form of discrimination, taking note of the obligations of the participating schools and the obligation of the state itself to ensure access for all students interested in the benefit of a voucher.

Discrimination on the Basis of Religion

We begin with religious discrimination because the *Zelman* (2002) decision, which upheld the Cleveland voucher program against a challenge that it violated the Establishment Clause of the First Amendment, serves as a touchstone for voucher analysis. The Supreme Court found the program constitutional because it served a secular purpose, did not define recipients on the basis of religion, and provided parents genuine choice from among a broad array of choices, both religious and nonreligious (*Zelman*, 2002). The Cleveland program survived scrutiny, in part, because it included a provision that required, as a condition of participation, that private schools not discriminate on the basis of religion in admissions [Ohio Rev. Code § 3313.976(A)(4)]. As noted earlier, it is the state's obligation to not exclude students based on religious beliefs.

As detailed above, few voucher programs now contain that safeguard and some even expressly permit religious criteria during admissions. Arguably programs lacking some provision that restricts consideration of a student's religion violate *Zelman*'s requirement that voucher recipients not be defined on religious criteria. By preserving religious school discretion in admissions, the state effectively conditions the array of choices available to students on religious grounds. Some students, because of their religious beliefs and the state's decision to permit schools to enforce religious admissions criteria, will not have equal access to the benefit of a voucher.

Discrimination on the Basis of Race

All but four of the voucher programs (Maine, Mississippi, Nevada, and Vermont) include explicit provisions that ensure that private voucher schools avoid discrimination on the basis of race. These provisions also demonstrate that states can place and have placed conditions on private schools that wish to receive public money in the form of a voucher. The US DOJ monitoring of the Louisiana voucher program for its effect on the state's desegregation efforts in its public schools also underscores the imperative states have to ensure their voucher programs have no racially discriminatory effect, either in the voucher program itself or on the public schools—especially when those schools remain under a desegregation decree.

Discrimination on the Basis of National Origin/Ethnicity

In addition to prohibiting discrimination on the basis of race and color, Title VI prohibits discrimination on the basis of national origin. This prohibition has been interpreted to apply to students not yet proficient in English and requires recipients of federal monies to offer instruction to attend to students' language learning needs (*Lau v. Nichols*, 1974). Typically, private schools do not receive federal funds and therefore would not usually be required to provide language instruction for children not fluent in English. The state, however, is a recipient of federal funds and is therefore obligated to ensure that all its programs are accessible to children requiring English instruction.

Offering a voucher without making a provision for how this group of children will be able to meaningfully participate in the program would appear to be a violation of Title VI's requirement that states "may not, directly or through *contractual or other arrangements* . . . [d]eny an individual any disposition, service, financial aid, or benefit" [28 C.F.R. § 42.104(b), emphasis added]. Clearly, approving private schools for participation in a publicly funded voucher program is a "contractual or other arrangement" that executes a state "benefit." Accordingly, the state must take affirmative action to ensure that meaningful access is available for all students regardless of national origin. Once again, failure to do so results in a voucher of one quality for those who speak English and a voucher of a lesser quality for those who need English language instruction.

Discrimination on the Basis of Disability

Setting aside those voucher programs designed only for children with disabilities, our statutory analysis revealed that not every state specifically provides protections for students with disabilities. This finding is not surprising and is consistent with the DOJ investigation of the Milwaukee Parental Choice Program. In earlier studies, scholars have raised concerns that voucher programs may be excluding students with disabilities because these students might be too expensive to educate. The state legislatures seemed to make deliberate decisions to exclude students with disabilities in voucher laws. Also, the lack of protection in state voucher law might be encouraging voucher schools to discriminate against students with disabilities by choosing not to enroll them or simply by choosing not to have special education expertise available.

Whether or not private participating schools actively discriminate against students with disabilities is only part of the equation. As the DOJ letter to Wisconsin's DPI illustrates, the state has an obligation under the ADA and Section 504 to take affirmative steps to ensure that its voucher programs are free from disability discrimination (Mead, 2015a). When a student is denied rights under the ADA or Section 504, it is considered disability discrimination. Whether a public school admits a student with a disability or a voucher school admits a student with a disability and does not follow the requirements of these federal civil rights' law, it is legally suspect. Only Indiana seems to have taken purposeful action to ensure that children with disabilities may exercise a voucher without losing special education and related services; it permits students to retain services from the district of residence or elect to receive special education services from the private school (IC 20-51-4-4.5). The other states, such as Wisconsin, would appear to be vulnerable to complaint on this issue.

Discrimination on the Basis of Sex

Only the Washington, DC, program specifically protects against discrimination based on sex, while still permitting single-sex education. Other voucher programs are silent on the issue. Given that some religions may have tenets affecting differential treatment of the sexes and that a majority of the programs make no provision for religious nondiscrimination, such silence may have the effect of voucher funds being used to discriminate on the basis of sex. At a minimum, the Fourteenth Amendment's Equal Protection Clause would require that states ensure that its voucher benefit is implemented in a nondiscriminatory manner and that girls and boys enjoy comparable benefits under the program (see, e.g., *United States v. Virginia*, 1996).

Discrimination on the Basis of Sexual Orientation

We also learned that no state specifically protects LGBT students within state voucher law antidiscrimination language. As with the issue of sex discrimination, the interaction between a lack of protection for students on the basis of sexual orientation in concert with the absence of a requirement for religious nondiscrimination is especially troubling. Even more so are the programs that explicitly preserve schools' discretion to use religious criteria during admissions or to refuse admission to any student. Under some of the voucher laws examined in this article (e.g., IN, AZ, CO), it appears that if a school participating in the voucher program objected to allowing an openly gay student to enroll there, the school could deny admission. For example, it could be possible for a religious school to deny a gay student a spot at the school because the student's sexual orientation runs contrary to the teachings of the church and school. Likewise, a voucher school might reject a student who has same-sex parents.

Of course a family could pursue a claim of denial of equal protection under the Fourteenth Amendment and would likely sue both the school and the state. The school might evade liability as a private entity by claiming it was merely complying with the voucher law. Private religious schools might argue, for example, that they are not required to accept LGBT students (or hire LGBT teachers) because it is contrary to the church's teaching. As was discussed in the case review, similar arguments were made by private schools during the 1950s–1970s, when both private K–12 and higher education institutions argued that they did not need to admit African Americans, sometimes based on religious beliefs. Religious rationales were rejected by the Court in cases involving racial discrimination from both a legal and policy perspective. Paraphrasing the *Runyon* Court (1976):

> [Private schools have the right under the First Amendment] "to engage in association for the advancement of beliefs and ideas. . . . From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that [homosexuality is wrong], and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding [LGBT students] from such institutions is also protected by the same principle." (pp. 175–176)

Nor is it established that schools that wish to engage in such exclusionary practices may still demand participation in a publicly funded program. Like tax-exempt status or the provision of materials, participation in a voucher program is a privilege that should be conditioned on

nondiscriminatory behavior in all its dimensions. Of course, some observers might argue under *Zelman* that the voucher is given to the parent who then selects the school. Specifically, by giving public funds through the independent decision of families, the state is not involved in the operational choices of schools where the voucher is spent (see Brownstein, 1999). Thus, voucher schools can discriminate based on race, sexual orientation, ability, and other factors. This line of reasoning is problematic for a few reasons. First, such thinking neglects the fact that the private schools must register and be approved by the state education agency in order to participate in the voucher program. Second, that argument conflicts with earlier Supreme Court precedent (e.g., *Runyon v. McCrary*, 1976), and third, it ignores the role of the state in the construction of the benefit itself.

As explained in the section on religious discrimination, the state's lack of protection for LGBT students and families may be interpreted as a de facto religious criteria for voucher receipt. By failing to protect this group of students by policy and practice, the state has conditioned the voucher benefit on a religious criterion and has limited the choices available to a discrete class of students under the voucher program in contravention of the *Zelman* decision. Similar to the Court in *Bob Jones*, we agree that "sensitive matters with serious implications for the institutions affected" must be carefully considered (p. 592). In addition, there can no longer be any doubt that LGBT discrimination, like racial discrimination, in education violates deeply and widely accepted views of elementary justice (p. 592). For example, if an LGBT student were expelled based on his sexual orientation, denied admission because of his gay parent, or denied admission because he could not sign a statement faith, it would raise many of the same legal and policy concerns that were present in *Bob Jones*. U.S. Supreme Court Chief Justice John Roberts asserted in a case involving race and public schooling that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (Justice John Roberts, *Parents Involved in Community Schools v. Seattle School District*, 2007, p. 748). It seems only reasonable that the Court recognize that the way to stop discrimination on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation. In *Bob Jones*, the Supreme Court did not find there to be a legitimate assertion of religion in matters involving racial discrimination and, it should do the same with regard to discrimination based on sexual orientation.

CONCLUSION

Given that charter schools and traditional public schools are taxpayer funded, from both a policy and a legal perspective, they should are free and open to all. We argue that because voucher programs likewise are public programs that rely on public money, the schools that receive these public funds, too, must be open to any student. Based on the use of state funds, it is indeed curious that states' antidiscrimination language in voucher program provisions does not mirror the antidiscrimination language that appears in statutes governing traditional public schools or public charter schools. It is worth remembering that the antidiscrimination provisions that govern those public schools were often enacted after litigation forced policymakers to recognize that public programs must meaningfully serve *all* the public, without regard to status characteristics. As such, the issue of discrimination in voucher programs should be a paramount consideration of policymakers. Although some state legislators may wish to include as many private schools,

including religious schools, in the voucher program with as little regulation as possible, ensuring nondiscriminatory access to the public benefit that is a voucher program must trump those desires.

Do those in the state legislature and the citizens who elect them realize the potential for discrimination that currently exists in voucher programs? Should lawmakers ignore these serious legal and policy concerns? We think not. As our analysis above demonstrates, programs without adequate nondiscrimination protections are vulnerable to legal action on a number of dimensions. Indeed, beyond the legal concerns, we should also examine the many public policy implications associated with voucher programs.

Ideally, publicly funded schools should be microcosms of society. Integrated schools are tied to the basic mission of public education in this country. Should taxpayer money be used to exclude certain groups of students from public benefits? Is this lack of accountability acceptable to taxpayers? Do programs without nondiscriminatory access serve the public good? The citizens of states with vouchers must consider some of the (un)intended consequences of its voucher programs. At the very least, the legislature should adopt clear, unambiguous, antidiscrimination measures in its voucher program(s) that mirror the protections in all other publicly funded educational programs (e.g., charter school law). Furthermore, administrative agencies and courts should enforce existing state and federal nondiscrimination laws in order to ensure that whenever the state creates an education benefit such as a voucher program, it is truly an equitable one. Our children deserve no less.

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